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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

VIA MONTANA, LLC,

Plaintiff, Cross-defendant and
Respondent;

PEARSON REALTY, INC., et al.,

Cross-defendants and Respondents,

v.

DON BEUKERS et al.,

Defendants, Cross-complainants and
Appellants.

F061975

(Super. Ct. No. 08CECG03804)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Miller & Ayala and Nathan S. Miller for Defendants, Cross-complainants and Appellants.

Dowling, Aaron & Keeler, Lynne Thaxter Brown and Stephanie Hamilton Borchers for Plaintiff, Cross-defendant and Respondent Via Montana, LLC.

McCormick, Barstow, Sheppard, Wayte & Carruth, David R. McNamara and Scott M. Reddie for Cross-defendants and Respondents Pearson Realty, Inc., et al.

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The tenants of restaurant premises appeal from a judgment entered against them after a jury trial. The landlord sued them for unpaid rent; they cross-complained against the landlord and the real estate agents who negotiated the lease, alleging the real estate agents misrepresented facts that induced them to lease space in the landlord's shopping center. The tenants alleged the landlord breached the lease and committed trespass and conversion by entering the property and changing the locks after serving the tenants with a notice of belief of abandonment. The jury found the tenants did not abandon the premises, but the landlord reasonably believed they did when it served the notice of belief of abandonment. It found in favor of the landlord on the claim for unpaid rent, in favor of the real estate agents on the claims against them, and in favor of the tenants on their cause of action against the landlord for conversion.

The tenants contend: the jury's findings regarding abandonment were inconsistent; the finding that the landlord had a reasonable belief of abandonment was not supported by substantial evidence; their request for a new trial against the real estate agents should have been granted; and the award of attorney fees to the landlord was excessive. We find no merit in the tenants' challenges to the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2006, Bill and Teresa Beukers and Bill's father, Don Beukers,¹ contracted with Via Montana to lease premises in Via Montana's shopping center for the purpose of operating a restaurant. The restaurant, Rhema, opened on February 1, 2007. It was never profitable. The Beukers paid the first month's rent and a security deposit. Don made one \$10,000 payment toward the rent in September 2007. Otherwise, the rent and other charges payable to Via Montana remained unpaid. On May 14, 2008, the

¹ For clarity and convenience, we will refer to the Beukers individually by their first names and collectively as the Beukers. No disrespect is intended.

Beukers closed the restaurant. On June 2, 2008, Via Montana, through its attorney, served the Beukers with a notice of belief of abandonment, which stated that the lease would terminate on June 20, 2008, unless they notified the attorney in writing before that date of (1) their intent not to abandon the property and (2) an address at which they could be served in an unlawful detainer action. The Beukers e-mailed Greg Eger, their contact person at Via Montana, asking about the notice, but they did not give timely notice in writing to Eger or the attorney that they did not intend to abandon the premises. On June 20, 2008, Via Montana had the locks on the restaurant changed; the Beukers were denied access to their equipment, some of which they had sold and were prevented from delivering.

Via Montana sued the Beukers for unpaid rent and other amounts due under the lease. Don filed a separate action against Via Montana, asserting numerous causes of action including breach of contract, fraud, and conversion. Don also named as defendants Pearson Realty, Inc. and various affiliated individuals (the Pearson defendants), alleging that they acted as agent for the Beukers in negotiating the lease and, in doing so, violated various obligations to him. Don filed a cross-complaint in the Via Montana action, which contained allegations similar to those contained in his complaint; the cross-complaint was later amended to add Bill and Teresa as cross-complainants in the causes of action alleged against the Pearson defendants. The two actions were consolidated.

On the first day of trial, October 13, 2010, when the trial court routinely attempted to identify the operative pleadings, the parties discovered that the Pearson defendants had failed to file an answer to the Beukers's first amended cross-complaint. The same day, the Beukers filed requests for entry of their defaults, and the Pearson defendants attempted to file answers. On October 15, 2010, because it appeared the court clerk had entered the defaults, the Pearson defendants filed an application for relief from default, which was based on their attorney's declaration admitting his fault in failing to timely file

the answer. On the second day of trial, October 18, 2010, the Beukers filed opposition, complaining that the application was procedurally defective in some unspecified way, and that the proposed answer added defenses that were not included in the Pearson defendants' answer to Don's complaint. Orally, the Beukers complained that the request for relief had not been made by noticed motion or pursuant to an order shortening time for the hearing; they suggested the claims involving the Pearson defendants should be severed so the request for relief could be resolved by a noticed motion and the claims involving Via Montana should go forward with trial. On October 18, 2010, the trial court granted the motion for relief from default, but limited the defenses the Pearson defendants could raise to those raised in their answer to Don's complaint.²

After a 17-day trial, the jury found in favor of Via Montana and against the Beukers in Via Montana's action for rent; it awarded \$202,411.55 in damages. The jury found in favor of Don on his conversion and trespass causes of action against Via Montana; it awarded him damages of \$3,550.00 for conversion, but awarded no damages for trespass. The jury found against the Beukers on their other causes of action, including those alleged against the Pearson defendants. Judgment was entered in accordance with the jury's findings.

The Beukers filed motions for judgment notwithstanding the verdict, to vacate the judgment, and for a new trial, all of which were denied. Via Montana filed a motion for an award of attorney fees pursuant to an attorney fee provision in the lease. The court granted the motion and awarded attorney fees of \$313,424.45 against all of the Beukers. The Beukers appeal. They challenge the award of rent to Via Montana, asserting that the

² During the oral discussion on the second day of trial, it was not clear whether the prior answer to which the court and the parties referred was an answer to Don's complaint or to Don's cross-complaint in the Via Montana action. In the declaration supporting the motion for relief, counsel for the Pearson defendants stated that Don's original cross-complaint was never served on his clients, so his clients never answered it. The Pearson defendants' prior answer was to Don's complaint.

jury's finding that Via Montana had a reasonable belief that the Beukers abandoned the premises was inconsistent with the finding that the Beukers did not abandon the premises and was not supported by substantial evidence; without such a belief, they contend, no rent may be awarded. They argue remand is required because the jury made no findings on their unlawful eviction cause of action. The Beukers contend their motion for a new trial of their claims against the Pearson defendants should have been granted because: (1) a noticed motion was required in order to set aside the defaults, and no such motion was filed; (2) the Beukers were not permitted to properly present their case because the other parties monopolized the available trial time and were given more peremptory challenges than was appropriate; and (3) a juror concealed until late in the trial the fact that he knew the wife of the Pearson defendants' counsel. Finally, the Beukers argue the trial court abused its discretion when it denied their request to reduce Via Montana's attorney fee award because it included amounts for motions that were unnecessary, unsuccessful, or duplicative.

DISCUSSION

I. Abandonment

The Beukers challenge the award of past and future rent to Via Montana, asserting that there was no substantial evidence of abandonment to satisfy the requirements of Civil Code section 1951.2.³ Section 1951.2 provides: "Except as otherwise provided in Section 1951.4, if a lessee of real property breaches the lease and abandons the property before the end of the term or if his right to possession is terminated by the lessor because of a breach of the lease, the lease terminates." (§ 1951.2, subd. (a).) The section then sets out the damages that may be recovered in the event of such termination.

"An abandonment takes place when 'the lessee leaves the premises vacant with the avowed intention not to be bound by his lease.' [Citation.]" (*Kassan v. Stout* (1973) 9

³ All further statutory references are to the Civil Code unless otherwise indicated.

Cal.3d 39, 43 (*Kassan*.) It “arises when the lessee intends to permanently relinquish all rights in the leased premises.” (*Avalon Pacific—Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1196.) ““The primary elements of abandonment are the intention to abandon and the external act by which the intention is carried into effect.”” (*Pickens v. Johnson* (1951) 107 Cal.App.2d 778, 787.)

Section 1951.3 sets out a procedure for establishing abandonment that is an alternative to directly proving the act and intent of the lessee:

“(a) Real property shall be deemed abandoned by the lessee, within the meaning of Section 1951.2, and the lease shall terminate if the lessor gives written notice of his belief of abandonment as provided in this section and the lessee fails to give the lessor written notice, prior to the date of termination specified in the lessor’s notice, stating that he does not intend to abandon the real property and stating an address at which the lessee may be served by certified mail in any action for unlawful detainer of the real property.

“(b) The lessor may give a notice of belief of abandonment to the lessee pursuant to this section only where the rent on the property has been due and unpaid for at least 14 consecutive days and the lessor reasonably believes that the lessee has abandoned the property.... [¶] ... [¶]

“(e) The real property shall not be deemed to be abandoned pursuant to this section if the lessee proves any of the following:

“(1) At the time the notice of belief of abandonment was given, the rent was not due and unpaid for 14 consecutive days.

“(2) At the time the notice of belief of abandonment was given, it was not reasonable for the lessor to believe that the lessee had abandoned the real property. The fact that the lessor knew that the lessee left personal property on the real property does not, of itself, justify a finding that the lessor did not reasonably believe that the lessee had abandoned the real property.

“(3) Prior to the date specified in the lessor’s notice, the lessee gave written notice to the lessor stating his intent not to abandon the real property and stating an address at which he may be served by certified mail in any action for unlawful detainer of the real property.

“(4) During the period commencing 14 days before the time the notice of belief of abandonment was given and ending on the date the lease would have terminated pursuant to the notice, the lessee paid to the lessor all or a portion of the rent due and unpaid on the real property.” (§ 1951.3, subs. (a), (b), (e).)

“Subdivisions (a) and (b) provide a procedure by which the lessor can be assured that a lease has been terminated when the rent is in default and it appears that the lessee has abandoned the leased property.” (Legis. Com. com., West’s Ann. Civ. Code (2010 ed.) foll. § 1951.3, p. 136.) The burden of proof of the matters listed in subdivision (e) “is placed on the lessee so that the lessor will be able to proceed to relet the property with reasonable assurance that the abandonment and termination will not later be set aside.” (*Ibid.*)

In its special verdict, the jury found that Via Montana gave the Beukers written notice of its belief they had abandoned the leased property; the Beukers failed to give written notice to Via Montana that they did not intend to abandon the leased property; at the time the notice was served, rent had been due and unpaid more than fourteen consecutive days; and, when the notice of belief was served, Via Montana had a reasonable belief the Beukers had abandoned the property. The jury also found, however, that the Beukers did not abandon the leased property. The Beukers contend the two findings are inconsistent and, because the jury found they did not abandon the property, the findings regarding the notice of belief of abandonment are immaterial; in the absence of abandonment, they assert, there was no entitlement to damages pursuant to section 1951.2.

Subdivision (f) of section 1951.3 makes clear that abandonment, for purposes of section 1951.2, may be proved by complying with the requirements of that section or by other means, such as directly proving the lessee’s intent to abandon and some act

carrying that intent into effect.⁴ Accordingly, the jury instructions stated: “To prove abandonment, Via Montana must prove either: [¶] 1. That the Beukers abandoned the leased premises; or [¶] 2. That there was an effective Notice of Belief of Abandonment” A separate instruction explained the requirements of a notice of belief of abandonment. In keeping with these instructions, the special verdict form asked whether the Beukers abandoned the leased property; the jury found that they had not. The special verdict also set out the various statutory requirements for a valid notice of belief of abandonment and asked whether they were met; the jury found that those requirements were met. Thus, in accordance with the statutes, the jury instructions and the special verdict permitted the jury to find abandonment in either of two ways: by finding Via Montana proved abandonment (intent to abandon and acts by which the intention was carried into effect) or by finding Via Montana proved compliance with the requirements for deeming the property abandoned pursuant to section 1951.3. The jury effectively found that Via Montana proved only the latter. Consequently, the jury’s findings were not inconsistent and were sufficient to establish that the Beukers were deemed to have abandoned the leased premises.

The Beukers also contend the finding that Via Montana reasonably believed the Beukers abandoned the property was not supported by substantial evidence. They assert Via Montana’s belief that the Beukers abandoned the premises was based on three factors: (1) the nonpayment of rent, (2) the closing of the restaurant, and (3) the property manager’s observation that there was no activity around the restaurant beyond a few days after the restaurant closed. They challenge the jury’s reliance on the second factor and

⁴ Section 1951.3, subdivision (f) provides: “Nothing in this section precludes the lessor or the lessee from otherwise proving that the real property has been abandoned by the lessee within the meaning of Section 1951.2.”

argue that Via Montana could not have reasonably inferred abandonment from the facts shown.

The Beukers argue that the closing of the restaurant could not be considered as a factor in determining whether Via Montana's belief of abandonment was reasonable. The argument is based on a single statement in *Kassan*: "[A]llowing a finding of abandonment to be premised on the doing of acts in violation of the lease agreement would effectively undermine this court's holding in *Jordan v. Talbot*, 55 Cal.2d 597." (*Kassan, supra*, 9 Cal.3d at p. 43.) The Beukers's argument seems to be that abandonment cannot be based on a breach of the lease—in this case the closing of the restaurant. This was not the holding of *Kassan*. The *Kassan* court went on to say: "As pointed out in *Jordan*, the lessor's remedy for breach of a leasehold agreement is the three-day eviction notice permitted by section 1161 of the Code of Civil Procedure, and 'a provision in the lease expressly permitting a forcible entry would be void as contrary to the public policy set forth in section 1159 [of the Code of Civil Procedure].' [Citation.]" (*Kassan, supra*, 9 Cal.3d at pp. 43-44.) In *Jordan*, the breach of the lease was a failure to pay rent. When the lessee was behind in her rent, the landlord entered her apartment pursuant to a provision allowing re-entry in the event of a breach, removed her belongings, and refused to allow her to occupy the apartment. (*Jordan v. Talbot* (1961) 55 Cal.2d 597, 601-602.) The lessee sued for forcible entry and detainer. The court concluded the landlord could exercise his right of reentry only through judicial process, i.e., an unlawful detainer proceeding. (*Id.* at pp. 604-605.)

Kassan was also an action by the lessees for forcible entry and detainer. The lessees breached the lease by assigning their rights to a third party without the landlord's consent; the third party moved onto the premises and continued the operation of the business. (*Kassan, supra*, 9 Cal.3d at p. 42.) The landlord evicted the new occupants without court process. The court found there was no abandonment; there was no default in payment of rent, the premises were not vacant, and the lessees did not disavow the

lease. Consequently, although the lessees breached the lease, their breach did not constitute abandonment. (*Id.* at pp. 43-44.) The court concluded: “A landlord is permitted to reenter without satisfying the requirements of section 1161 of the Code of Civil Procedure only when the tenant has abandoned the premises and thereby lost his right to possession.” (*Id.* at p. 44.) Because the lessees did not abandon the premises, the landlord had no right to reenter without bringing an unlawful detainer action. Thus, *Kassan* does not stand for the proposition that a breach of the lease can never be relied upon, or considered with other factors, to establish abandonment.

At trial, there was evidence that, on June 2, 2008, when the notice of belief of abandonment was served, the Beukers were approximately 14 months behind in their rent, owed Via Montana approximately \$180,000, and had stopped operating the restaurant as of May 14, 2008. The property manager, Carol Stair, had observed that the premises appeared to be unoccupied, although furnishings remained; there was a notice on the door indicating the restaurant was closed. Stair testified she saw the Beukers at the restaurant for a few days after it closed, then saw no further activity; she advised Eger of the lack of activity. Eger testified that, on June 2, 2008, he believed the Beukers had abandoned the property. They had not paid rent, had ceased operating the restaurant, and Stair had observed no activity. Of the 14 other restaurants that had closed in shopping centers he was involved with, all of them had left their equipment in the restaurant when they failed; it made it easier to re-lease the premises and mitigate the damages for which the lessee was responsible. Eger consulted an attorney, who advised him to use the notice of belief of abandonment in order to obtain possession of the premises; the attorney prepared the paperwork to do so. All of this evidence supported the jury’s finding that Via Montana reasonably believed, at the time the notice of belief of abandonment was given, that the Beukers had abandoned the restaurant.

The Beukers argue that other evidence was presented that made a belief of abandonment unreasonable. Where the sufficiency of the evidence to support the

judgment is challenged, “we resolve all conflicts in favor of the prevailing party, indulging in all legitimate and reasonable inferences from the record. When a finding is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence in the record, contradicted or uncontradicted, that will support the finding. When two or more inferences can be reasonably deduced from those facts, the reviewing court has no power to substitute its deductions for those of the fact finder.” (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 374.)

The Beukers cite evidence that they were on the premises daily between the time the restaurant closed and June 2, 2008, that they informed Via Montana they were trying to sell the business, that there were for sale signs in the windows, and that they left their equipment on the premises. We may not reweigh the evidence, however. (*In re A.S.* (2011) 202 Cal.App.4th 237, 244.) Substantial evidence supports the jury’s findings, and the Beukers have not demonstrated error.

II. Unlawful Eviction

The Beukers assert, without supporting argument or references to the record, that this matter must be remanded to the trial court because the jury made no findings on Don’s cause of action for unlawful eviction.

The cause of action for unlawful eviction in Don’s cross-complaint alleged that he was unlawfully evicted from the premises by Via Montana changing the locks and refusing to allow him to enter the premises; it alleged Via Montana’s claims that Don abandoned the premises were unlawful and made in bad faith. Thus, the theory underlying this cause of action was that the eviction was unlawful because Via Montana improperly used the notice of belief of abandonment procedure to obtain possession.

The special verdict form included questions regarding whether Via Montana gave notice of belief the Beukers had abandoned the property, whether the Beukers gave written notice they did not intend to abandon the property, and whether the other

requirements for use of a notice of belief of abandonment were met. The jury found that the requirements for the use of a notice of belief of abandonment were met and the Beukers did not give Via Montana timely written notice that they did not intend to abandon the property. “A special verdict presents to the jury each ultimate fact in the case, so that ‘nothing shall remain to the Court but to draw from them conclusions of law.’ (Code Civ. Proc., § 624.)” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285.) The jury made findings of ultimate fact from which the trial court correctly concluded Don had failed to establish his cause of action for unlawful eviction. We find no error and no cause to remand to the trial court.

III. New Trial on Claims against the Pearson Defendants

The Beukers challenge the denial of their motion for new trial of their claims against the Pearson defendants. A new trial may be granted on the ground there was “[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial,” or on the ground of “[m]isconduct by the jury.” (Code Civ. Proc., § 657, subds. (1), (2).) The Beukers contend there were multiple irregularities in the proceedings that prevented a fair trial, as well as misconduct by one juror.

“[T]he grant or denial of a motion for a new trial ... to a large extent rests in the discretion of the trial judge. The appellate function is to review the discretion exercised by the trial court in light of the evidence but not to replace it unless it was arbitrarily exercised. [Citation.]” (*Gordon v. Strawther Enterprises, Inc.* (1969) 273 Cal.App.2d 504, 511.) Thus, we apply an abuse of discretion standard of review.

A. Relief from default

The Beukers first contend the Pearson defendants should not have been permitted to participate in the trial because they were permitted to do so only after the trial court

granted their motion for relief from default, but that motion was heard without the required statutory notice or an order shortening time for the hearing.⁵

On the morning of the first day of trial, Wednesday, October 13, 2010, when the trial court routinely attempted to identify the operative pleadings, the parties and the court were unable to locate in the court file an answer by the Pearson defendants to the Beukers's first amended cross-complaint. When the proceedings resumed after the lunch break, the court noted it was still trying to locate the operative pleadings. Later in the afternoon, when counsel for the Pearson defendants represented that he had been unable to locate an answer to the amended cross-complaint, but that an answer would be filed by the following morning, counsel for the Beukers advised that it was too late and the default had been taken. According to the file stamps on the documents, the Beukers filed a request for entry of the default of Pearson Realty at 1:05 on October 13, 2010. At 4:00 p.m. that day, the Pearson defendants filed an answer to the Beukers's amended cross-complaint. At 4:44 p.m. that day, the Beukers requested the defaults of the remaining Pearson defendants. The court clerk entered all of the defaults that day. On October 14, 2010, counsel for the Pearson defendants requested that the Beukers stipulate to setting aside the defaults, but the Beukers refused.

On Friday, October 15, 2010, the Pearson defendants served and filed an application for relief from default, setting it to be heard on the second day of trial, Monday, October 18, 2010. The application was supported by the declaration of the Pearson defendants' attorney, which explained the procedural background that led to his inadvertent failure to file an answer.⁶ On October 18, 2010, the Beukers filed opposition

⁵ We note that the contention of the Beukers's attorney at oral argument that he was unable to be heard on this issue at trial was not borne out by the record.

⁶ The Pearson defendants opposed the Beukers's motion for leave to amend the cross-complaint; after the motion was granted, the Pearson defendants filed a motion for reconsideration of that decision and a motion to strike portions of the amended cross-complaint.

to the application for relief from default. They complained that proper notice of an ex parte application had not been given. They conceded Pearson Realty, John Stewart, and John Lee had answered Don's prior complaint, but noted that Alyson Mathew and Mike Mele were newly added cross-defendants who, they asserted, had not previously appeared.⁷ They also complained that the answer the Pearson defendants proposed to file added affirmative defenses not raised in the answer to Don's complaint, which they represented would prejudice them. The trial court granted the motion for relief, but limited the affirmative defenses the Pearson defendants could raise in the answer to those previously included in their answer to Don's complaint. The Pearson defendants filed an answer in conformity with that order, and the trial proceeded.

The Beukers contend the Pearson defendants' application for relief should have been denied because it was not brought by noticed motion as required by Code of Civil Procedure section 1005. That section requires that at least 16 court days notice be given for motions, "[u]nless otherwise ordered or specifically provided by law." (Code Civ. Proc., § 1005, subd. (b).) Thus, it recognizes that the court may shorten the notice period. Similarly, rule 3.1300 of the California Rules of Court⁸ requires motions to be served and filed in accordance with Code of Civil Procedure section 1005, but authorizes the court, on its own motion or on a party's application for an order shortening time, to prescribe a

The attorney held the answer he had prepared while his motions were pending, then inadvertently neglected to have it filed after the motions were resolved.

⁷ Mathew and Mele had appeared multiple times prior to and at the outset of trial. Along with the other Pearson defendants, they filed a motion to strike portions of the amended cross-complaint and paid a first appearance fee to do so. They stipulated to continue the trial date and to a protective order. They filed motions in limine. The record also contains an order on a discovery dispute, which reflects the appearance of counsel on behalf of the Pearson defendants, including Mathew and Mele, and allows the taking of the depositions of "Cross-Defendant Alyson Mathew and Cross-Defendant Mike Mele."

⁸ All further references to rules are to the California Rules of Court unless otherwise indicated.

shorter time for service. (Cal. Rules of Court, rule 3.1300(a), (b).) Rules 3.1200 through 3.1207 provide an ex parte procedure for obtaining orders by giving notice the day before the hearing.

“On the question of notice it has been said generally ‘ ... that the [trial] court has inherent power either on its own motion, or on ex parte application, or on notice, to set aside an order or judgment taken through its own inadvertence or mistake; that a prematurely entered order is such an inadvertence, and that application pursuant to section 473 of the Code of Civil Procedure is not necessary.’ [Citation.]” (*Badella v. Miller* (1955) 44 Cal.2d 81, 87.) The court may correct its own clerical error, which appears on the face of the record, on the court’s own motion and without notice. (*Id.* at p. 88.) On the face of the record, it appears the defaults of John Stewart, John Lee, Mike Mele, and Alyson Mathew on the amended cross-complaint were improperly entered through clerical error; the file stamps indicate they were entered after the Pearson defendants had filed an answer to the cross-complaint. The trial court was authorized to set aside the defaults of the individuals on the court’s own motion and without notice. The individual cross-defendants were entitled to have their defaults set aside because they were improperly entered. As to the individuals, there was no irregularity in the proceedings and the trial court did not abuse its discretion by denying the motion for new trial.

Only the default of Pearson Realty was entered prior to the filing of the answer. Its request for relief from default was not made on 16 court days notice or pursuant to an order shortening time. It filed a written application for relief from default bearing a hearing date of October 18, 2010, the second day of trial. The Beukers filed a written opposition and opposed the request orally on the second day of trial.

“It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. [Citations.] This rule applies even when no notice was given at

all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on appeal ... that he had no notice of the motion or that the notice was insufficient or defective.’ [Citations.]” (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697 (*Carlton*)). Even where the party files opposition objecting to the insufficiency of notice, if the party appears at the hearing and argues the merits of the motion, without requesting a continuance or explaining how it was prejudiced by the insufficiency of the notice, the party may be deemed to have waived any defect in the notice given. (*Id.* at pp. 697-698.) In order to obtain reversal on appeal on the basis of insufficient notice, an appellant must demonstrate not only that the notice was defective, but that the appellant was prejudiced. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289.)

The Beukers written opposition to the request for relief from default did not discuss the lack of a noticed motion or the insufficiency of notice. It asserted vaguely that the Pearson defendants did not comply with Code of Civil Procedure section 473, subdivision (b), and rule 3.1201; it stated that the application consisted mostly of the declaration of the Pearson defendants’ attorney, and an attorney declaration alone is insufficient. The bulk of the written opposition consisted of the Beukers’s complaint they were being “sandbagged” on the eve of trial with the assertion of new affirmative defenses. When questioned at the hearing about their procedural objection, counsel for the Beukers explained that inadequate ex parte notice was given; the Pearson defendants failed to provide the date, time and place of the application and the ex parte relief being sought. When the court asked how the Beukers would be prejudiced if the Pearson defendants were permitted to file an answer, but were limited to raising the same affirmative defenses as the answer Pearson Realty, Stewart and Lee had filed to Don’s complaint, the Beukers’s attorney responded that he would be denied discovery from the new cross-defendants, Mele and Mathew, on the existing affirmative defenses. When the court pressed counsel to explain how he could have failed to conduct needed discovery on the affirmative defenses when he was unaware of what defenses had or had not been

raised, because he was unaware an answer had not been filed on behalf of the new cross-defendants, counsel for the first time asserted that the Pearson defendants should be required to file a regularly noticed motion for relief. He proposed that the claims involving the Pearson defendants should be severed from those involving Via Montana to allow the Pearson defendants to file such a motion, while the claims involving Via Montana should proceed to trial alone.

The Beukers opposed the motion on the merits before raising any objection to the lack of a regularly noticed motion. They did not request a continuance in order to allow them more time to file opposition. They did not explain how they were prejudiced by the insufficiency of the notice. They did not claim that the lack of notice prevented them from adequately addressing the issues raised by the application: the reason for the failure to file an answer and whether the application demonstrated that the requirements for mandatory relief under Code of Civil Procedure section 473, subdivision (b), were met. Thus, as discussed in *Carlton*, the Beukers may be deemed to have forfeited any defect in the notice given.⁹

Additionally, the Beukers have not established in this court any prejudice from the lack of notice. The trial court limited the affirmative defenses the Pearson defendants could raise; this resolved the contention in the Beukers's written opposition that they would be sandbagged if the Pearson defendants added new affirmative defenses at the outset of trial. On appeal, the Beukers have not identified any additional arguments or authorities they would have presented if they had been given further time to respond to the motion. They have not asserted that, given longer notice, they would have shown that

⁹ Although the loss of the right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a "waiver," the correct legal term is "forfeiture," because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the "intentional relinquishment or abandonment of a known right." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) Accordingly, we use the term "forfeit."

any of the Pearson defendants was not entitled to relief under the mandatory attorney fault provision of Code of Civil Procedure section 473, subdivision (b). Under that provision, “the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, ... unless the court finds that the default ... was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.” (Code Civ. Proc., § 473, subd. (b).) The Pearson defendants’ application was made two days after entry of default, before any judgment was entered. The application identified the parties seeking relief, the relief sought, and the statutory basis for granting relief; it was accompanied by a memorandum of points and authorities in support and a declaration setting out the facts that assertedly justified relief. The declaration was that of the Pearson defendants’ attorney, who explained the circumstances leading to the failure to answer the cross-complaint and acknowledged that the failure to file a timely answer was due to his neglect. The Beukers have identified no evidence they would have presented, if they had been given more notice, to show that “the default ... was not in fact caused by the attorney’s mistake, inadvertence, surprise, or neglect.” (*Ibid.*)

The Beukers acknowledge that the Pearson defendants could have brought an ex parte application for an order shortening time to bring the motion for relief from default. In light of the imminence of trial, it is likely the trial court would have granted such an application and heard the motion on very short notice. Because the Pearson defendants’ application and the Beukers’ opposition to it addressed the merits of the request for relief from default, the trial court effectively shortened time and heard the matter and ruled on its merits immediately, without further delaying the trial. The Beukers have not shown any likelihood that the outcome would have been different if the Pearson defendants had made an ex parte request for an order shortening time and the trial court

had set the matter for hearing on a few days notice, either with or without delaying the trial.

Even if there were some minor “[i]rregularity in the proceedings of the court,” the Beukers have not shown that it prevented them from having a fair trial. (Code Civ. Proc., § 657, subd. (1).) The trial court did not abuse its discretion by denying the motion for new trial.

B. Peremptory challenges

“When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) Additionally, “an appellant has the burden of producing a record affirmatively showing error [citation].” (*Lerno v. Oberfell* (1956) 144 Cal.App.2d 221, 223-224.) “Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation.]” (*Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660.)

The Beukers assert that they were deprived of their ability to prosecute their claims against the Pearson defendants and Via Montana because those parties were treated as two sides and were given eight peremptory challenges each, while the Beukers were given only eight peremptory challenges. The Beukers present no argument, citation to authority, or citation to the record in support of this argument. They also failed to provide a record of the jury selection. Without that record, this court cannot determine how many peremptory challenges were exercised by each party. Thus, the record is not adequate to establish prejudicial error. For these reasons, we treat the point as forfeited.

C. Monopolization of time

The Beukers contend they should have been granted a new trial against the Pearson defendants for irregularity in the proceedings, because misconduct of the other parties deprived them of their ability to prosecute their claims against the Pearson defendants; they contend Via Montana and the Pearson defendants monopolized the trial

time, leaving the Beukers with insufficient time to fully present their case. A new trial may be granted for an “[i]rregularity in the proceedings ... by which either party was prevented from having a fair trial.” (Code Civ. Proc., § 657, subd. (1); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 870 (*Decker*)). Misconduct by counsel or a party may constitute such an irregularity, if it prevents a party from having a fair trial. (*Decker, supra*, at p. 870; *Piercy v. Piercy* (1906) 149 Cal. 163, 166.)

Trial commenced on October 13, 2010. At the outset, the Pearson defendants estimated the trial would take eight to 10 days, including jury selection; Via Montana thought it might take up to 12 days. Counsel for the Beukers gave a time estimate of “five to seven [days] max.” The trial court informed the prospective jurors that the time estimate was 10 to 12 court days, but stressed that this was “the best estimate based upon our present knowledge. The trial may go a longer or shorter time than that.” The court determined the order in which the parties would present their cases. Via Montana was to present its claim for unpaid rent first, then the Beukers were to present their defense to that claim and the evidence in support of their cross-complaint. The Pearson defendants would present their defense to the Beukers’s cross-complaint against them. Finally Via Montana would present its defense to the Beukers’s cross-complaint against it.

Witness testimony began on October 21, 2010, the fifth day of trial, with Via Montana presenting its contract claim first. On the tenth day of trial, Via Montana rested and the Beukers began their presentation during the morning session. The Pearson defendants’ expert witness testified out of order during the Beukers’s presentation. On November 4, 2010, the thirteenth day of trial, the Beukers rested. The Pearson defendants also rested, without calling any further witnesses. Via Montana presented one brief rebuttal witness and some deposition testimony, then also rested.

The Beukers represent that “Via Montana used nearly seven full days of trial to put on its one claim,” leaving the Beukers only two and a half days for their defense to that claim and their affirmative claims against both Via Montana and the Pearson

defendants. The record shows, however, that there were nine days of presentation of witness testimony and other evidence. Via Montana's case-in-chief was presented in a little over five days, while the Beukers's case took approximately three days (two full days, plus parts of two other days). During the presentation of Via Montana's case, moreover, the parties, including the Beukers, questioned the witnesses about information relevant to the cross-complaint and the Beukers's defenses to the rent claim. As a result, simply comparing the number of days used for each party's case does not give an accurate picture of the presentation of evidence during the trial.

At the beginning of the ninth day of trial, the court indicated the jury was asking how long the trial would last. Counsel for the Pearson defendants stated he thought he could be done in a day; counsel for the Beukers said their case would probably take three and a half days.

On the eleventh day of trial (the second day of the Beukers's case), counsel for the Beukers complained that counsel for the Pearson defendants was taking up time questioning witnesses about subjects that pertained to Via Montana's case more than their own. The Beukers suggested imposing time limits. The trial court observed it was giving the Beukers all the time they had asked for; it expressed reluctance to impose time constraints in midtrial, because it would be unfair to the parties who had not already presented their cases. The court noted there were limits on the availability of some of the jurors, and urged the parties to "get cracking" in order to complete the trial. Later the same morning, the court reiterated these thoughts and offered to advise the jury that the testimony already received could be considered on all issues in the case, to avoid duplication.

At the end of the twelfth day of trial, the trial court revisited the scheduling issues. Counsel for the Beukers outlined his planned witnesses for the following day; counsel for the Pearson defendants indicated he intended to pare down his expert witness's testimony and eliminate potentially duplicative witnesses. The court reassured counsel for Via

Montana that it would allow him time to present his defense to the cross-complaint, because he had not been allowed to present that evidence in his case-in-chief. The court described the limitations on juror availability, and suggested one option would be to deny juror No. 10 the day off she had requested to attend a meeting, in order to finish before other jurors became unavailable. The parties finished their presentations and rested the next day.

The record does not reflect any monopolization of trial time by Via Montana or the Pearson defendants. It indicates that, despite the court's attempt to separate the parties' presentations, the evidence relevant to the various claims and defenses overlapped and much of it was presented during Via Montana's case-in-chief. As the case progressed, the trial court made the parties aware of time issues resulting from the potential unavailability of jurors. It declined to impose time limits midway through the trial because of fairness concerns. The trial court told all the parties that they needed to move their cases along in order to finish before the jurors had serious time problems; it stressed throughout, however, that it would not deny the parties the time needed to fully present their cases.

An irregularity in the proceedings is grounds for a new trial only if the moving party was thereby prevented from having a fair trial. (*Wood v. Jamison* (2008) 167 Cal.App.4th 156, 162.) The Beukers do not explain how they were prevented from having a fair trial. While they assert they were denied sufficient time to fully present their case at trial, they have not identified any witness or evidence they did not present, but would have presented if they had been allowed more time. At the hearing of the motion for new trial, the court specifically asked counsel for the Beukers to identify any point at which its ability to put on evidence was limited; counsel did not do so, but merely argued generally that he felt he was forced to choose between continuing with a smaller jury and agreeing to a mistrial. The trial court acknowledged that "we did come

close to running out of time at the end,” but noted there were other options, such as requiring the jurors to come back later, which were not explored.

The Beukers have not established that there was any irregularity in the proceedings, including any misconduct of a party or its counsel, which prevented them from having a fair trial. Accordingly, we find no abuse of discretion in the trial court’s denial of their motion for a new trial.

D. Misconduct of juror

“Concealment by a juror during his *voir dire* examination of a state of mind which would prevent his acting impartially is misconduct constituting an irregularity for which a new trial may be granted under section 657, subdivisions 1 and 2, of the Code of Civil Procedure. [Citations.]” (*People ex rel. Dept. of Pub. Wks. v. Curtis* (1967) 255 Cal.App.2d 378, 388.) However, “a motion for a new trial will not be granted upon the ground that a juror upon *voir dire* examination has incorrectly answered questions, in the absence of a showing that (1) prejudice has resulted to the appealing party, or (2) there were wilfully false and untruthful answers given by the juror which would lead to the inference that the juror was animated by a dishonest motive in qualifying.” (*George v. City of Los Angeles* (1942) 51 Cal.App.2d 311, 321.)

The Beukers assert they are entitled to a new trial against the Pearson defendants because a juror concealed the fact that he knew the wife of the Pearson defendants’ attorney. During closing argument, the court received a note from juror No. 1 which stated: “I realize I know McNamara’s wife. I do not believe this would affect my ability to decide the case. I thought I would let you know.” The trial court read the note to the attorneys; no one objected, requested further information, or sought to question juror No. 1.

The Beukers have failed to establish any concealment or misconduct by juror No. 1. “It is incumbent upon an appellant to present a record which affirmatively shows error on its face.” (*Dunford v. General Water Heater Corp.* (1957) 150 Cal.App.2d 260,

264 (*Dunford*.) When the appellant claims a juror gave incorrect information or concealed information during voir dire, an adequate record must include a transcript of the voir dire proceedings. (*Ibid.*) The record in this case does not include the voir dire proceedings; thus, there is nothing to establish that the jurors were asked during voir dire whether they knew the spouses of the attorneys for the parties, or any other question that should have elicited the information the Beukers claim was concealed. The record is not sufficient to affirmatively establish either concealment or the willfulness of any concealment.

When juror misconduct is alleged as the basis for a request for a new trial, the party asserting such misconduct must submit affidavits showing that both the party and its attorneys were ignorant of the facts constituting the claimed misconduct until after the rendition of the verdict. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103.) The purpose of this requirement “is to prevent a party who, personally or through counsel, has discovered some jury misconduct during the course of the proceedings from gambling on the outcome of the jury’s deliberations while secretly preserving the error to be raised on a motion for a new trial in the event of an unfavorable verdict. The rule is well settled that when at any time during trial a party or his counsel becomes aware of facts constituting misconduct or irregularity in the proceedings of the jury, he must promptly bring such matters to the attention of the court, if he desires to object to it, or he will be deemed to have waived the point as a ground for a motion for a new trial. [Citations.]” (*Ibid.*)

The Beukers could not submit the required affidavits. The court and the parties were aware before jury deliberations began that juror No. 1 knew McNamara’s wife. The Beukers had an opportunity to seek a remedy at the time the court received the juror’s note. They did not object to juror No. 1 continuing as a juror; they did not seek to question him concerning his knowledge of, or relationship with, McNamara’s wife. The Beukers complain that they were not given any options for dealing with the situation, but

they did not ask for any; they did not indicate to the court that the information created any problem at all. Consequently, they are deemed to have forfeited the point as a ground for a motion for a new trial.

IV. Attorney Fees

The judgment awarded Via Montana its recoverable costs. Recoverable costs include attorney fees, when authorized by contract. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) When attorney fees are authorized by contract, the party that prevails on the contract is entitled to an award of reasonable attorney fees, fixed by the court. (Civ. Code, § 1717, subd. (a).) “[T]he determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court, whose decision cannot be reversed in the absence of an abuse of discretion.” (*Melnyk v. Robledo* (1976) 64 Cal.App.3d 618, 623.) “Discretion is abused in the legal sense “whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.” [Citations.]’ [Citation.]” (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682 (*Hadley*).)

The trial court’s first step in determining reasonable attorney fees is to establish “the lodestar figure—a calculation based on the number of hours reasonably expended multiplied by the lawyer’s hourly rate.” (*EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774.) The lodestar figure is subject to adjustment, based on ““a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.’ [Citation.]” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 (*PLCM*).)

After prevailing at trial, Via Montana filed a motion seeking an award of attorney fees pursuant to a clause in the lease agreement and section 1717. It presented billings showing the total fees incurred by Via Montana amounted to \$411,032.60. Via Montana requested the full amount of its prior attorneys’ fees, but discounted the amount of fees

charged by the attorneys who represented it at trial by 25 percent. Via Montana requested a total attorney fee award of \$314,456.50.

The Beukers opposed Via Montana's request for attorney fees. They asserted, among other things, that the fees claimed were excessive, unreasonable, duplicative, and unnecessary. The trial court granted Via Montana's motion for attorney fees and awarded it fees of \$313,424.45. On appeal, the Beukers assert the amount of fees awarded was unreasonable because the fees could have been avoided if (1) Via Montana had accepted the Beukers's offer for Via Montana to keep their restaurant equipment in payment of the unpaid rent and (2) Via Montana had not filed repetitive, frivolous motions.

A. Offer of equipment for unpaid rent

In *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437 (*Meister*), during the course of litigation, the defendants made several settlement offers to the plaintiff, all of which the plaintiff rejected. The parties subsequently arbitrated their dispute, resulting in an award in favor of the plaintiff, consisting of \$25,000 in damages, \$2,500 in punitive damages, an injunction to which the defendants stipulated, and plaintiff's reasonable attorney fees in an amount to be set by motion. (*Id.* at pp. 443-444.) Judgment was entered on the award. The plaintiff filed a motion seeking attorney fees of \$428,851.17. The defendants opposed the motion, asserting the requested fees were excessive. (*Id.* at p. 444.) A special master reviewed the matter and concluded the number of hours the attorneys billed was excessive and the judgment was less favorable to the plaintiff than the settlement offer the defendants had made on December 10, 1993. The special master recommended that the trial court either cut off the attorney fees as of the date of the more favorable settlement offer or reduce the fees to \$75,000 because of the small monetary judgment and the similarity between the injunctive relief granted and the injunctive relief included in the December 10, 1993, offer. (*Id.* at p. 445.) The trial court exercised its discretion and limited the plaintiff's fees to those incurred up through

December 10, 1993 (\$75,500.96); it found the hours expended after December 10, 1993, were not reasonably spent on the case “because plaintiff could have obtained all of the relief he ultimately achieved, and more, by accepting that offer.” (*Id.* at pp. 445, 449.)

On appeal, the court concluded that, although the December 10, 1993, settlement offer was not made in accordance with Code of Civil Procedure section 998, this “did not prevent the trial court from allowing the underlying policy concerns addressed by that section to guide its exercise of its discretion in this case. The basic premise of section 998 is that plaintiffs who reject reasonable settlement offers and then obtain less than the offer should be penalized for continuing the litigation.” (*Meister, supra*, 67 Cal.App.4th at p. 450.) Although the section 998 penalties did not apply, the trial court had “the discretion to decide whether attorney time spent after defendants’ December 1993 settlement offer was time ‘reasonably spent.’” (*Meister*, at p. 450.) The court concluded the trial court’s action was neither arbitrary nor irrational, and upheld the award. (*Id.* at pp. 450, 456.)

Relying on *Meister*, the Beukers contend Via Montana’s attorney fees could have been avoided if Via Montana had accepted their settlement offer prior to commencement of the litigation, and therefore no award of attorney fees should have been made. In their opening brief, the Beukers assert that, on the day Via Montana changed the locks on the restaurant, the Beukers offered to allow Via Montana to keep all of their equipment, “which was purchased for approximately \$150,000.00,” in exchange for the rent they owed. The portion of the record they cite does not support that value. In their reply brief, the Beukers assert they offered Via Montana the equipment, which “was worth no less than \$100,000,” without citation to the record. Although Teresa testified she thought Don purchased the equipment for approximately \$150,000, Don testified he paid \$87,000 or \$89,000 for the equipment; the receipt admitted in evidence indicated the total was approximately \$89,000. The jury awarded Via Montana \$202,411.55; after deduction of

the amount awarded to Don Beukers on his cause of action for conversion, Via Montana's net award was \$198,861.55.

Meister stands for the proposition that the trial court has discretion to reduce the attorney fees awarded, if the party claiming fees continued to litigate after receiving and rejecting a reasonable settlement offer that would have granted the party at least as much relief as the party ultimately obtained through the judgment. In this case, however, the judgment was more favorable to Via Montana than the Beukers's settlement offer. Via Montana did not continue to litigate after receiving and rejecting an offer more favorable to it than the ultimate judgment. The trial court did not abuse its discretion by impliedly rejecting the Beukers's assertion that Via Montana's attorney fees were not reasonably expended because they could have been avoided if Via Montana had accepted the Beukers's settlement offer.

B. Unsuccessful, meritless, or repetitive motions

“[T]he trial court has broad authority to determine the amount of a reasonable fee.” (*PLCM, supra*, 22 Cal.4th at p. 1095.) ““[U]nless special circumstances would render such an award unjust,” ‘parties who qualify for a fee should recover for all hours *reasonably spent*....’ [Citation.] ‘A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.’ [Citation.]” (*Meister, supra*, 67 Cal.App.4th at pp. 447-448, fn. omitted.) The trial court may adjust the fee award to exclude compensation for services that were duplicative. (*Hadley, supra*, 167 Cal.App.3d at p. 683.)

The Beukers argue that Via Montana should have been denied attorney fees for the following motions or oppositions because they were unsuccessful or meritless, or both, and the fees were therefore unreasonable: (1) oppositions to the Beukers's petition for writ of possession and motion for change of venue; (2) opposition to the Beukers's motion to deem matters admitted and to compel discovery responses; (3) two petitions to compel arbitration; (4) two motions for summary judgment; and (5) two petitions for a

writ of attachment. They also challenge Via Montana’s second petition for writ of attachment, second petition to compel arbitration, and second motion for summary judgment as duplicative. Moreover, the Beukers assert the fees awarded for all of the challenged motions and oppositions were excessive.

1. Unsuccessful or meritless motions

“[A] plaintiff who is successful on only some claims may nonetheless be entitled to recover fees for services on the unsuccessful claims.” (*Children’s Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 781.) When “‘a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff’s fees even if the court did not adopt each contention raised.’ [Citation.] ‘To reduce the attorneys’ fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the costs of enforcing’ the plaintiff’s rights. [Citations.]” (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 431.) “Litigation often involves a succession of attacks upon an opponent’s case; indeed, the final ground of resolution may only become clear after a series of unsuccessful attacks. *Compensation is ordinarily warranted even for unsuccessful forays.* [Citations.] [¶] A litigant should not be penalized for failure to find the winning line at the outset, unless the unsuccessful forays address discrete unrelated claims, are pursued in bad faith, or are pursued incompetently, i.e, are such that a reasonably competent lawyer would not have pursued them.” (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1303, italics added.)

Thus, fees for Via Montana’s motions and oppositions were not required to be excluded from the fee award simply because the motions and oppositions were unsuccessful. The Beukers assert the motions and oppositions were also meritless, but the record does not demonstrate that they were pursued in bad faith or that a reasonably competent lawyer would not have pursued them. Don’s petition for writ of possession sought possession of the equipment and other personal property that remained in the

restaurant when Via Montana had the locks changed. Via Montana initially opposed the petition on the merits, arguing the Beukers did not respond to the notice of belief of abandonment or request possession of the property, so the property was deemed abandoned; it later asserted it had offered the Beukers access to the property, so the request for a writ of possession was moot. Although Don's motion was granted, nothing in the record indicates the opposition was filed in bad faith or incompetently.

Regarding the motion for change of venue, the Beukers assert "it cannot be disputed that Via Montana filed the initial lawsuit against [them] in the wrong county." The Beukers's motion was not based on an argument that the action was filed in the wrong county, however; it was based on a claim that Fresno County was an appropriate forum for the action and a more convenient forum for the litigation.¹⁰

The record on appeal does not include any ruling on the Beukers's motion to deem matters admitted and to compel discovery responses from Via Montana. Thus, it does not indicate Via Montana's opposition to that motion was unsuccessful, much less that it was pursued in bad faith or incompetently.

While Via Montana's motions for summary judgment were denied, the trial court's ruling denying the motions contained nine pages of explanation, with no indication that the trial court thought either motion was frivolous, or pursued unreasonably or in bad faith. The Beukers assert that it would have been impossible for Via Montana to prevail on a motion for summary judgment because a key issue in the case was whether the Beukers abandoned the property, and abandonment was a factual

¹⁰ The declaration supporting the motion for change of venue acknowledged that the Beukers initially asked Via Montana to transfer its action from Santa Clara County, where it was originally filed, to Fresno County because it was the wrong venue; they contended none of the defendants resided there and none of the relevant events occurred there. They asserted Don resided in Alaska. Because Via Montana maintained that Don had identified Santa Clara County as his place of residence in connection with the lease transaction, the Beukers expressly "removed Don Beukers residency as a basis for Defendants' request" for a change of venue.

issue for the jury. Summary judgment motions commonly address factual issues, however. A factual issue only prevents the granting of a motion for summary judgment when there is a dispute as to the facts and it requires a trial (i.e., a triable issue of material fact). (Code Civ. Proc., § 437c, subd. (c).) Abandonment or belief of abandonment was only a key issue in the Beukers's defense to one of the summary judgment motions. That motion attempted to show it was undisputed the Beukers breached their lease contract by failing to pay the rent, and therefore they were liable to Via Montana for the unpaid rent.

The record does not support the Beukers's assertion that the petitions for writ of attachment were unsuccessful. The first petition was granted. No ruling on the second petition is included in the record. The Beukers assert the writ of attachment was granted by the trial court, but reversed by the appellate court. The record indicates the appeal from the writ of attachment was dismissed.

The trial court did not abuse its discretion by declining to reduce the attorney fees awarded by the amounts attributable to the motions and oppositions the Beukers claim were unsuccessful or meritless, or both.

2. Repetitive motions

The Beukers contend Via Montana's two motions for summary judgment, two petitions for writ of attachment, and two petitions to compel arbitration were duplicative, so at least some of the fees for them should have been denied. The second motion for summary judgment was not, as the Beukers claim, "nearly a mirror image of the first motion." The first motion sought judgment on Via Montana's complaint against the Beukers. The motion addressed the Beukers's obligations to pay rent and other amounts pursuant to the lease, their failure to make those payments, Via Montana's performance of its lease obligations, and the balance owed pursuant to the contract. The second motion sought summary judgment in favor of Via Montana on Don's cross-complaint. That motion addressed primarily issues regarding Don's standing to sue and whether he sustained any damage as a result of the conduct alleged in the cross-complaint.

The first petition for a writ of attachment was filed on December 23, 2008; it requested attachment of property valued at approximately \$232,000, to ensure payment of rent accrued but unpaid at that time. The second petition, filed almost two years later, sought attachment of property valued at approximately \$502,000, to ensure payment of past unpaid rent due as of September 1, 2010. The Beukers offer no authorities demonstrating it was improper for Via Montana to file a second petition for a writ of attachment seeking authorization to attach property of greater value because the unpaid rent continued to accrue during pendency of the action.

The first petition to compel arbitration was addressed to Don's complaint. It asserted, among other things, that Don, Bill, and Teresa were partners in leasing the shopping center space from Via Montana. Bill and Teresa both signed the lease and initialed the arbitration agreement. Don signed the lease but did not initial the arbitration agreement. Via Montana argued that, despite his failure to initial the arbitration agreement, Don was bound by the arbitration agreement; he was a partner or colessee with Bill and Teresa in leasing the property to operate a restaurant, and Bill, Teresa, and the real estate agent representing all three of them, initialed the arbitration agreement. The trial court's ruling denying the motion to compel arbitration did not mention the partnership issue, except to observe that Don, Bill and Teresa signed the lease as tenants and no partnership was mentioned.

The second petition to compel arbitration addressed Don's cross-complaint (prior to amendment of the cross-complaint to add Bill and Teresa as cross-complainants) and made similar arguments. The trial court concluded "[n]o legally sufficient pre-existing relationship between Don, Bill Beukers ("Bill") and Teresa Beukers ("Teresa"), who both did sign the agreement, has been demonstrated to hold Don to the arbitration clause."

The Beukers contend it was "extremely clear" that Don could not have been compelled to arbitrate his claims because he did not initial the arbitration provision of the lease. There are well-recognized exceptions, however, to the rule that one must be a

signatory to an arbitration agreement in order to be bound by it. For example, “[a] nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory. [Citation.]” (*Westra v. Marcus & Millichap Real Estate Investment Brokerage Co., Inc.* (2005) 129 Cal.App.4th 759, 765; see also *Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1513, listing six theories by which a nonsignatory may be bound by an arbitration provision.) Via Montana argued there was a partnership or joint lessee relationship between Don and the other Beukers, which justified requiring him to arbitrate his dispute with Via Montana pursuant to the provision in the lease. The trial court ultimately determined that such a relationship had not been established, but that ruling does not indicate the petitions to compel arbitration were frivolous or without foundation. Further, the two petitions addressed different pleadings filed by Don; arguably, Via Montana was required to promptly request arbitration as to each pleading or risk having its right to arbitration deemed forfeited. (See *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1203, “a party who does not demand arbitration within a reasonable time is deemed to have waived the right to arbitration.”)

The trial court did not abuse its discretion by declining to reduce the attorney fees awarded based on the Beukers’ assertion that certain of Via Montana’s motions were duplicative.

C. Excessive fees

Finally, in their reply brief, the Beukers generally challenge the amount of fees billed for certain motions, contending the number of hours claimed was excessive. The trial court has broad discretion to determine the amount of reasonable attorney fees to be awarded. (*PLCM, supra*, 22 Cal.4th at p. 1095.) “The experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment

is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong’—meaning that it abused its discretion. [Citations.]” (*Ibid.*) The Beukers set out the amounts of time counsel for Via Montana spent on various motions and the amounts they billed Via Montana for them. They ignore the fact that the fee request reflected a 25 percent reduction from the amounts billed. The fee award was virtually the same as the requested fee, meaning the court awarded 25 percent less than the amounts billed to Via Montana and cited in the Beukers’s argument. The trial court was in the best position to determine the need for the various motions, the amount of time reasonably expended in their preparation, and the reasonable fees to be awarded for the attorneys’ services. Nothing in the Beukers’s briefs persuades us that the amount awarded was clearly wrong. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed. Via Montana is entitled to its costs on appeal.

HILL, P. J.

WE CONCUR:

KANE, J.

DETJEN, J.